

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Amendment of Section 73.202) RM-9953
of the Commission's Rules)
Table of Allotments) MM Docket No. 00-169
For FM Broadcast Stations)
(Oswego and Granby, NY))

To: Chief, Mass Media Bureau

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

Clear Channel Broadcasting Licenses, Inc. ("CCBL"), the licensee of
WXBB(FM) (formerly WVOA(FM)), Facility ID No. 22134, DeRuyter, New York, hereby files
this reply to the Opposition to Petition for Reconsideration (the "Opposition"), which was
submitted on December 13, 2001, by Galaxy Communications, LP ("Galaxy"), the licensee of
WTKV(FM), Channel 288, Oswego, New York, against CCBL's Petition for Reconsideration
(the "Petition") submitted on October 22, 2001. 1/

The Petition sought reconsideration of the *Report and Order* in this docket, which
adopted Galaxy's request to re-allot Channel 288A from Oswego to Granby, New York at a set
of reference coordinates that caused CCBL's timely filed modification application for WXBB
(the "WXBB Modification Application") to be inconsistent with site-spacing requirements. 2/

1/ Pursuant to Sections 1.4(j) and 1.429(g) of the Commission's Rules, this Reply is due
December 26, 2001. Accordingly, it is timely filed. CCBL also has filed Reply Comments in
Support of Cram Proposal ("CCBL Surreply"), a Motion for Stay (the "Stay Motion") and a
Reply to Opposition to Motion for Stay (the "Stay Reply") in this proceeding.

2/ See *Oswego and Granby, New York*, Report & Order, MM Docket No. 00-169
(Allocations, released September 21, 2001) (the "Order").

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The *Order* reached this result by determining whether Galaxy's proposal or the WXBB Modification Application would better serve the Commission's four allotment priorities.

But long-established Commission policy specifies that the Allocations Branch should resolve, whenever possible, these sorts of conflicts between an allotment proposal and a timely filed application through a site restriction on or an alternate set of reference coordinates for the proposed allotment. ^{3/} CCBL (and Cram Communications, Inc., the prior licensee of WXBB) had identified a reasonable site restriction that would enable adoption of both a new Granby allotment and the WXBB Modification Application. As neither Galaxy nor the *Order* has demonstrated the sort of prejudice from the proposed site restriction necessary to preclude use of the proposed site restriction under the Commission's established policy, there simply was no need for the Allocations Branch to compare Galaxy's petition and the WXBB Modification Application under the Commission's rules governing mutually exclusive allotment proposals. Instead, the Allocations Branch should have allotted Channel 288A to Granby with a site restriction (or alternate set of reference coordinates) that would have enabled the WXBB Modification Application to be adopted as filed. Accordingly, the *Order* should be reconsidered as it is contrary to Commission precedent and policy, and is inconsistent with the public interest by specifying a set of theoretical reference coordinates for an FM allotment that would preclude a pending and publicly beneficial modification application.

^{3/} See, e.g., *Weaverville, California*, Report & Order, 12 FCC Rcd 2965, 2967 (¶ 3) (Allocations, 1997); *Kerman, California*, Report & Order, 11 FCC Rcd 2887, 2887-88 (¶ 10) (Allocations, 1996); *Warrenton, Georgia*, Report & Order, 6 FCC Rcd, 5174, 5174 (¶¶ 2-3) (Allocations, 1991).

**Galaxy's Attacks on CCBL Cannot Obscure the Fact that
All Relevant FCC Precedent Favors Adoption of CCBL's Proposed Resolution**

Galaxy alleges that CCBL's pleading relies on "bald assertions." ^{4/} To the contrary, throughout this proceeding, CCBL has demonstrated how express Commission policy and specific Commission precedent compel reconsideration of the *Order*. ^{5/} First, CCBL has explained that the applicable Commission policy is to "eliminate conflicts between a rulemaking petition and a later-filed FM application where possible to do so without prejudice to the affected parties." ^{6/} Only in cases where this long-standing policy of mutual accommodation cannot resolve a conflict between competing proposals will the Allocations Branch apply its four allotment priorities to compare the proposals. But the *Order* did not even consider the possibility of adopting the minor (four-kilometer) site restriction or alternate set of reference coordinates that CCBL proposed for the Granby allotment, even though either would have enabled a new service to be brought to Granby and WXBB to construct its modified facility at its proposed – and non-hypothetical – transmitter site.

Second, CCBL detailed a long list of precedent that applied this established mutual accommodation policy in precisely the manner that CCBL contends it should have been applied in the *Order*. Each of these cases demonstrates that the Allocations Branch first should assess whether it can use alternate reference coordinates or a site restriction to enable the proposed allotment to be approved at a site that can provide the necessary coverage to the

^{4/} Opposition at 3.

^{5/} See, e.g., Petition at 6-12; CCBL Surreply at 4-6; *Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, Report & Order, 7 FCC Rcd 4917 (1992), on reconsideration, 8 FCC Rcd 4743, 4745 n.12 (1993) ("*Conflicts Recon Order*").

^{6/} See Petition at 7 (inadvertently citing *id.* in lieu of full cite to *Kerman, California*, 11 FCC Rcd at 2887 (¶ 4), which references *Conflicts Recon Order*).

proposed community of license *and* allow the timely application to be approved without amendment. 7/ Contrary to Galaxy's assertions, none of these cases ever suggests that, when a reasonable site restriction or alternate set of reference coordinates is available, the Allocations Branch simply can choose to disregard the Commission mutual accommodation policy in order to require the amendment or dismissal of the conflicting application

Galaxy's next allegation – that CCBL's discussion of the Commission's own extensive precedent compelling reconsideration is “highly misleading because Clear Channel omits vital portions of the language from relevant precedent” 8/ – is answered by the record of this proceeding. Unlike Galaxy, CCBL has returned again and again to the precedent most directly relevant to the matter. 9/ That precedent uniformly demonstrates that the *Order* failed to take into account the appropriate Commission policy when it accorded the Granby allotment an alternate set of reference coordinates *that continue to block the use of the site proposed in the WXBB Modification Application*. 10/ In all but one of the cases detailed by CCBL in the Petition

7/ See, e.g., *Weaverville, California*, 12 FCC Rcd at 2967 (¶ 3) (attempting to use site restriction for rulemaking proposal to avoid conflict with timely application); *Kerman, California*, 11 FCC Rcd at 2887-88 (¶¶ 8-10) (using site restriction and alternate channel for rulemaking proposal to avoid conflict with timely application); *Warrenton, Georgia*, 6 FCC Rcd, at 5174 (¶¶ 2-3) ((using site restriction for rulemaking proposal to avoid conflict with timely application). Even prior to the Commission adoption of the mutual accommodations policy, the Allocations Branch routinely imposed site restrictions on proposed allotments that otherwise would conflict with timely filed applications even when the allotment proponent opposed the site restriction. See, e.g., *Huntingdon, Tennessee*, 8 FCC Rcd 3918, 3918 (¶ 4 & n.2) (Allocations, 1993); *Thomasville, Alabama*, 7 FCC Rcd 4463, 4464 (¶ 7) (Allocations, 1992) (explaining that allotment proponent had no right to set of reference coordinates for upgraded allotment that would be short-spaced to then-pending modification application, even though it would require allotment proponent to re-locate its existing station).

8/ Opposition at 4.

9/ See, e.g., Petition at 13-14; Reply to Opposition to Motion for Stay at 5 n.7.

10/ See Petition at 10-12.

on this point, the Commission applied a site restriction to the allotment proposal in order to enable the modification application to be processed without amendment. 11/ In the one exception – *Weaverville* – the Allocations Branch tried to resolve a conflict through a site restriction but did not do so only because no possible restricted site could have guaranteed the necessary coverage of the allotment's proposed community of license. 12/ Neither Galaxy nor the *Order* ever alleged that the minor site restriction proposed by CCBL would preclude WTKV from providing sufficient service to Granby. Accordingly, the relevant Commission precedent agrees with CCBL that the *Order* should be revised to enable the WXBB Modification Application to be processed at its initially proposed site.

In fact, at no point in this proceeding has Galaxy identified a single relevant precedent in which the Commission did not seek to use a reasonable site restriction, alternate channel or alternate set of reference coordinates to remove a conflict between an allotment proposal and a timely modification application. The three cases that Galaxy claims to support its arguments are all distinguishable on at least two important grounds: 13/

- i) none of the cases involves a conflict between an allotment proposal and an application that did not require a related change in an allotment; and
- ii) even more important, none of the cases indicates that a site restriction or alternate set of reference coordinates could have resolved the relevant conflict.

Moreover, the only one of the three cases that Galaxy even attempts to discuss – *Bainbridge, Georgia* – actually supports CCBL's arguments. In *Bainbridge*, the Allocations Branch refused

11/ See *id.*

12/ See *id.* at 12 (citing *Weaverville, California*, 12 FCC Rcd at 2967 (¶ 3)).

13/ See Opposition at 4 & n.6 (citing *Bear Lake and Honor, Michigan*, 12 FCC Rcd 4933 (1997); *Bainbridge, Georgia*, 12 FCC Rcd 13399 (1997); *Berlin, DeForest, Markesan and Wautoma, Wisconsin*, 10 FCC Rcd 7733 (1995)).

to grant an application necessary to implement an allotment upgrade because that application conflicted with an allotment proposal that would provide new service to Bainbridge, Georgia. However, as the reconsideration of the initial *Bainbridge* order makes clear, the denial of the application was not because the Allocations Branch *chose* not to apply its established policy of trying to find a mutual, non-prejudicial accommodation. ^{14/} Rather, the *Bainbridge Reconsideration Order* itself notes that the Commission staff had attempted to locate an alternative channel for the proposed allotment, but none were available. And no party in that proceeding ever alleged that both proposals could be accommodated through a reasonable site restriction on the rulemaking proposal. In other words, insofar as *Bainbridge* (including its reconsideration) is relevant to this case, it is but further evidence that established Commission policy directs the Allocations Branch to attempt to resolve conflicts between a timely application and an allotment proposal before it compares the two under the Commission's four allotment priorities.

Accordingly, under all relevant Commission precedent, the Allocations Branch should have imposed a site restriction on (or prescribed an alternate set of reference coordinates for) the proposed Granby allotment that would have enabled the WXBB Application to be processed without a change in its proposed site unless Galaxy could show legitimate prejudice to

^{14/} See *Bainbridge, Georgia*, Memorandum Opinion & Order, 13 FCC Rcd 6424, 6425-26 (¶¶ 4-5) (Policy and Rules, 1998) (the "*Bainbridge Reconsideration Order*"), *reconsidering* Report & Order, 12 FCC Rcd 13399 (1997). Galaxy apparently overlooked that *Bainbridge* was subject to reconsideration when it repeatedly cited that case in its Opposition. See Opposition at 4 nn.6-8, 8 n. 26 (failing to include any reference to reconsideration of *Bainbridge* order). As a result, Galaxy again cites a proceeding which, upon closer scrutiny, actually supports CCBL's position. See, e.g., Petition for Reconsideration at 15 (noting that two cases that Galaxy had cited earlier in this proceeding actually support CCBL's stance that site restrictions on allotment proposals should be used as a first means of resolving conflicts between those proposals and timely applications and citing *Roxton, Texas* and *Soper, Oklahoma*, 13 FCC Rcd 20992, 20993

its rights from the proposed site restriction. ^{15/} Commission precedent has identified only three types of prejudice that *might* preclude use of the mutual accommodation policy: i) unjustified delay while the Commission processes an *untimely* application or counterproposal; ii) FAA, environmental or zoning difficulties that would preclude construction of a useable tower for the proposed allotment in the restricted area; and iii) a site restriction that is likely to preclude the allotment from serving its proposed community of license. ^{16/} Neither Galaxy nor the *Order* has demonstrated any of these types of prejudice. ^{17/}

In fact, the only allegation of prejudice that Galaxy even attempts to assert is that the proposed site restriction would reduce the net gain that WTKV can expect from its proposed re-allotment. But Commission precedent already has rejected such a claim. In the leading case interpreting the mutual accommodation policy, one of the parties opposing the site restriction and

(¶ 4 n.5) and *Vacaville and Middleton, California*, 4 FCC Rcd 8315, 8316 (Allocations 1989), *recon. denied*, 6 FCC Rcd 143 (1991)).

^{15/} Galaxy also implies that the Allocations Branch is obligated to determine if the WXBB Modification Application is grantable as is before it can be given any consideration. *See* Opposition at 7. Galaxy cites no precedent for this claim. In fact, none of the Commission precedent on this point indicates that the Allocations Branch is to conduct any sort of analysis as to whether a conflicting application may be granted, as an application is processed according to different standards than those used by the Allocations Branch. In any event, as the WXBB Modification Application is grantable under the application processing rules used by the Audio Services Division, this legal debate is irrelevant. Specifically, both the "line-of-sight" and the WBBS short-spacing items, each of which already have been addressed in the WXBB Modification Application, present no reason to deny the Application.

^{16/} *See, e.g., Bainbridge Reconsideration Order*, 13 FCC Rcd at 6425-26 (¶¶ 4-5) (finding delay resulting from consideration of untimely counterproposal to be prejudicial to rulemaking proponent); *Weaverville, California*, Report & Order, 12 FCC Rcd at 2967 (¶ 3) (finding site restriction unfeasible because of limited number of potential tower sites near community of license); *Kerman, California*, 11 FCC Rcd at 2888-89 (¶ 9) (suggesting that demonstrable FAA, environmental or zoning difficulties with proposed site restriction may preclude use of mutual accommodation policy).

^{17/} *See* Petition at 8-9.

channel change necessary to accommodate a pending modification application protested that the proposed changes not only would "greatly reduce the flexibility of applicants to secure a transmitter site, and add significantly to the costs of erecting the necessary physical structures, but would reduce the potential population coverage as the specified site is in a more sparsely populated area." ^{18/} The Commission summarily denied all of these claims as irrelevant to the allotment process. ^{19/}

Moreover, Galaxy has even a weaker claim than the petitioner in *Kerman*. First, CCBL's proposed resolution requires a mere four-kilometer site restriction, which is much less restrictive than the 11.7-kilometer restriction adopted in *Kerman*. Second, Galaxy has shown itself able to adopt an alternate set of reference coordinates when it proposed to do so in its reply comments in this proceeding. Third, there is not even an allegation that terrain difficulties or local land use restrictions limits Galaxy's ability to locate a suitable site from which it could serve all of Granby with its new allotment. Fourth, in this instance, the minor site restriction that would allow both proposals to move forward still would enable Galaxy to increase WTKV's service population by more than 70,000 persons as compared to its current location.

^{18/} *Kerman*, 11 FCC Rcd at 2888 (¶ 6).

^{19/} *See Kerman*, 11 FCC Rcd at 2889 (¶ 10). The logic underlying the Commission's mutual accommodation policy also dictates that the Allocations Branch should not consider changes to a proposed service population to constitute prejudice. Because a site restriction, by its very nature, will limit the area where a tower can be located, it would be virtually impossible to implement a site restriction that would not cause some change in the potential service population of a proposed allotment. In other words, to be able to reject a site restriction based on changes in potential population served is tantamount to making the allotment proponent able to reject any site restriction (and to obligating the Allocations Branch to protect the site preference of an allotment proponent.) *Cf. Thomasville, Alabama*, 7 FCC Rcd at 4464 (¶ 7) (explaining that allotment proponent had no right to set of reference coordinates for upgraded allotment that would be short-spaced to then-pending modification application, even though it would require allotment proponent to re-locate its existing station). Such a result cannot be consistent with established allotment procedures or the Commission's mutual accommodation policy.

**Other Public Interest Consideration Also Favor Reconsideration,
Which Will Enable First Local Service to Granby *and* a Substantial Total Increase in Net
Service For Both Galaxy's and CCBL's Stations**

Galaxy seeks to sidestep the overwhelming precedent in favor of reconsideration of the *Order* by claiming that "important public interest factors" justify the *Order's* result. But, again, Galaxy simply neglects the fact that CCBL's proposed resolution of this matter both would be consistent with Commission precedent *and* serve the public interest. Specifically, as noted repeatedly in this proceeding, CCBL's proposed resolution:

- i) would enable Galaxy's station to bring a first local transmission service to Granby;
- ii) would enable Galaxy's station to increase net service by more than 70,000 listeners; and
- iii) would enable Galaxy's station and WXBB to collectively increase service to more than 265,000 persons (as well as other substantial benefits), while the *Order's* allotment (at Galaxy's currently proposed site) would increase net service by only 184,851 persons (and would preclude WXBB from increasing its service in any practicable way).

As for Galaxy's other alleged public interest concerns, none suggests any basis for a waiver of the Commission's mutual accommodation policy. For example, CCBL's resolution does not effectively "neutralize" the elimination of an existing short-spacing between WTKV and a Canadian station – it will in fact enable WTKV to reduce that short-spacing which, in any event, does not create any contour overlap over Canadian land. 20/ In addition, Galaxy neglects the many undisputable public interest benefits of CCBL's proposed resolution. Specifically, the proposed move of WXBB would result in: i) a net increase of 191,051 to WXBB's service

20/ See CCBL Surreply at 9-10.


population; (i) the elimination of four existing domestic short-spacings; and (ii) the reduction of mutual interference and a short-spacing to WH Q(FM), Williamsport, Pennsylvania. 21

CONCLUSION

In light of the substantial public interest benefits of CCBI's proposal to accommodate the proposed reallocation of Channel 288A to Granby and the WXBB Modification Application, and the overwhelming weight of relevant Commission precedent, CCBI hereby urges the Mass Media Bureau to reconsider the *Order* as requested in the Petition.

Respectfully submitted,

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December 26, 2001

21. See CCBI's Reply at 3. Of the comparatively small population losing service, all will remain well-served, except for 1,621 persons who will have access to four radio stations. The Commission has long concluded that the creation of such a small "four-service" population should not vary a publicly beneficial change. See, e.g., *Anniston and Ashland, Alabama, and College Park, Covington, Milledgeville, and Social Circle, Georgia*, Report and Order, 15 FCC Red 9973 (2000); *Heraldton and Krion, Texas*, Report and Order, 14 FCC Red 3932 (Allocations, 1969).

CERTIFICATE OF SERVICE

I, Charlene Jones, hereby certify that on this 26th day of December, 2001, a copy of the foregoing Reply to Opposition to Petition for Reconsideration was sent by first-class mail, postage prepaid, to:

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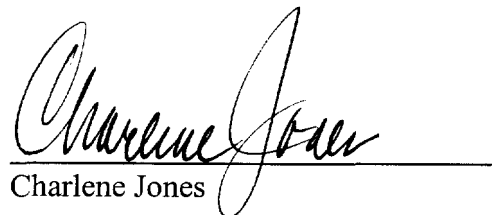
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